Nos. 80-1012, 80-1030, 80-1052

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

BAXTER RICE, Director, Department of Alcoholic Beverage Control of the State of California,
Petitioner,

vs.

NORMAN WILLIAMS COMPANY, et al.,
Respondents.

BOHEMIAN DISTRIBUTING COMPANY,
Petitioner,

vs.

NORMAN WILLIAMS COMPANY, et al.,
Respondents.

WINE & SPIRITS WHOLESALERS OF CALIFORNIA, a California corporation,
Petitioner,

vs.

NORMAN WILLIAMS COMPANY, et al.,
Respondents.

On Writ of Certiorari to the Court of Appeal of the State of California, Third Appellate District

BRIEF AMICI CURIAE ON BEHALF OF THE DISTILLED SPIRITS COUNCIL OF THE UNITED STATES, INC.

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This brief is filed with the written consent of all the parties, pursuant to Rule 36.2 of the Rules of the Supreme Court of the United States. It is in support of the position of petitioners upholding the validity of the California law which provides that a brand of distilled spirits may be imported into California only by persons designated to do so by the brand owner.

INTEREST OF THE DISTILLED SPIRITS COUNCIL OF THE UNITED STATES, INC.

The Distilled Spirits Council of the United States, Inc. (hereinafter "DISCUS") is a nonprofit corporation formed by distilled spirits manufacturers, importers, and others for the purpose of furthering the interests of the distilled spirits industry. Its members include the suppliers of a great majority of the distilled spirits sold throughout the United States.

The law held invalid by the court below was designed to protect the right of brand owner members of DISCUS to choose the wholesalers who distribute their brands in California. That right is presently being threatened by certain provisions of Oklahoma law which, as interpreted by a trial court of that state,[1] permit Oklahoma wholesalers to demand unlimited quantities of any brand of liquor sold in Oklahoma for transshipment to other states,

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[1]See *Central Liquor Co.* v. *Oklahoma Alcoholic Beverage Control Board* (1981) No. CJ-81-1413 (Dist.Ct.Okla.Cty.). A copy of the trial court's opinion from the bench in *Central Liquor* has been lodged with the clerk of this Court in connection with the Brief of the Solicitor General in support of the Petition for Certiorari.

including California. Unless the legislation which is the subject of the present case is upheld, the interests of DISCUS members in California will be vitiated by that Oklahoma law or by similar laws which may be adopted by other states.

SUMMARY OF ARGUMENT

This case involves the claimed inconsistency between the Sherman Act and California Business and Professions Code § 23672. The California Court of Appeal, mistakenly believing that these laws were in conflict, held that the Sherman Act preempted the California law. But § 23672 does not require any conduct which is contrary to the Sherman Act, and consequently no issue of federal preemption is presented in this case. The decision of the court below to the contrary is plainly wrong and should be reversed.

ARGUMENT

I. THE FEDERAL ANTITRUST LAWS PREEMPT ONLY INCONSISTENT STATE LAWS.

Each state has authority under the Twenty-first Amendment to regulate the distribution of alcoholic beverages within its borders. "As this Court has consistently held, 'That Amendment bestowed upon the states broad regulatory power over the liquor traffic within their territories' " (*Seagram & Sons* v. *Hostetter* (1966) 384 U.S. 35, 42, quoting *U. S.* v. *Frankfort Distilleries* (1945) 324 U.S. 293, 299). Despite the strong presumption of validity accorded state legislation in this field, the court below erroneously held that federal antitrust laws preempt § 23672 of the California Business and Professions Code, which provides

that a brand of distilled spirits may be imported into California only by persons authorized by the brand owner.[3]

State police power, even over subject matters not specifically given to state control by the Constitution, is not to be lightly disregarded.

> "The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakenly so ordained" (*Florida Avocado Growers* v. *Paul* (1963) 373 U.S. 132, 142).

Clearly, neither of these grounds for preemption is present here. Congress has not "unmistakenly * * * ordained" that the Sherman Act should preempt state control of alcoholic beverage distribution, nor is the subject matter one which demands uniform federal regulation. To the contrary, the Constitution plainly establishes individual state and local control over alcoholic beverages, not uniform national regulation. "The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system" (*California Liquor Dealers* v. *Midcal Aluminum* (1980) 445 U.S. 97, 110).

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[3]"A licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner or his authorized agent."

Federal preemption may also occur when state and federal laws make incompatible demands. "A holding of federal exclusion of state law is inescapable * * * where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce" (*Florida Avocado Growers* v. *Paul* (1963) 373 U.S. 132, 142). This Court has held that preemption on this ground is appropriate only when the state and federal laws are in actual and inescapable conflict. The "teaching of this Court's decisions * * * enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists" (*Huron Cement Co.* v. *Detroit* (1960) 362 U.S. 440, 446).

So, for example, in *Seagram & Sons* v. *Hostetter* (1966) 384 U.S. 35, this Court upheld New York's price affirmation statute against charges that collecting the information required by the statute would lead to horizontal price-fixing conspiracies. No grounds for federal preemption were found because the state law in that case "impose[d] no irresistible economic pressure on the appellants to violate the Sherman Act in order to comply with the [law's] requirements" (384 U.S. at 45). By contrast, preemption was applied in *California Liquor Dealers* v. *Midcal Aluminum* (1980) 445 U.S. 97, because the challenged law affirmatively required distillers to fix the retail price of their products, in direct contravention of federal antitrust law.

II. THE CALIFORNIA STATUTE IS CONSISTENT WITH FEDERAL ANTITRUST LAWS.

A. The California statute permits a manufacturer to select distributors of its own products in California.

Section 23672 does not mandate resale price maintenance or any other violation of federal law. Unlike the fair trade laws held invalid in *California Liquor Dealers* v. *Midcal Aluminum* (1980) 445 U.S. 97, section 23672 serves only to preserve a competitive situation in California which is recognized and approved by antitrust policy. That policy is to protect the long-established right of a manufacturer to select, unilaterally and for legitimate business reasons, distributors for the manufacturer's own products.

Section 23672 enables a distiller directly to choose distributors of its products in California. This Court has repeatedly affirmed that under the antitrust laws a manufacturer is free "to exercise his own independent discretion as to parties with whom he will deal" (*United States* v. *Colgate & Co.* (1919) 250 U.S. 300, 307). "[T]he right to select its customers may well be the most essential factor in the maintenance of the highest standards of service" (*U. S.* v. *Bausch & Lomb Co.* (1944) 321 U.S. 707, 728-729). In *Reeves, Inc.* v. *Stake* (1980) 447 U.S. 429 this Court reaffirmed that right, holding that South Dakota, as the operator of a state-owned cement factory, could lawfully refuse to sell to non-South Dakota residents. When a manufacturer decides to distribute its products through one wholesaler and not another, the rejected distributor has suffered no antitrust injury, but only a defeat in the competitive market which the antitrust laws are intended to foster (see, *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.* (1977) 429 U.S. 477, 489).

B. The California statute, by enabling manufacturers to establish franchises for sales of their own products in California, does not require conduct that is unlawful under the federal antitrust laws.

The court below acknowledged that § 23672 did not come within any of the "common violations of the Sherman Act" (Appendix to Petition for Certiorari,[3] p. 16), but it held nonetheless that the section on its face conflicted with the Sherman Act because it enabled a distiller "to prevent trade among others" (Appendix to Petition for Certiorari, p. 17). The court below regarded this power to prevent unauthorized third parties from purchasing a distiller's products as decisive. However, it failed to appreciate the significance to this case of this Court's ruling in *Continental T. V., Inc.* v. *GTE Sylvania Inc.* (1977) 433 U.S. 36.

Section 23672 permits a brand owner to limit sales of its own products in California from distributors in other states. Distillers might ordinarily achieve the same result through vertical restrictions such as establishing a limited number of distributor franchises within California. However, the distiller's ability to establish such franchises in California has been undermined by the extraterritorial effect of laws of other states that deny the fundamental

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[3]References to the Appendix to Petition for Certiorari are to the Appendix to the Petition of Baxter Rice, No. 80-1012.

right of a seller to choose its customers.[4] The California Legislature enacted § 23672 to restore the normal competitive situation in California.

The control over sales from out of state provided by § 23672 can best be understood in light of this Court's ruling in *Continental T. V., Inc.* v. *GTE Sylvania Inc.* (1977) 433 U.S. 36, which held that vertical non-price restrictions imposed by private contract are not per se unlawful, but are to be judged under the rule of reason. The court below dismissed the *GTE Sylvania* case as inapposite on the ground that the present case involves "the state provided authority of the distillers to prohibit [respondents] from trading with others" (Appendix to Petition for Certiorari, p. 20), and stated that "it is irrelevant that the statute gives brand owners the power to restrain intrabrand competition rather than interbrand competition" (ibid., pp. 17-18). But the distinction between intrabrand and interbrand restrictions is critical. As explained in *GTE Sylvania*, limitation of intrabrand competition resulting from vertical non-price restraints may be justified by the resulting increase in interbrand competition. The reasoning

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[4]Oklahoma's Alcoholic Beverage Control law has been construed to require distillers to sell to every Oklahoma wholesaler all amounts of liquor ordered by such wholesaler, and to permit Oklahoma wholesalers to transship such liquor to other states, including California (*Central Liquor Co.* v. *Oklahoma Alcoholic Beverage Control Board* (1981) No. CJ-81-1413 (Dist.Ct.Okla.Cty.). As so interpreted, this law has fundamentally altered the ordinary competitive situation in other states in which franchising is permitted. The California Legislature, by passing § 23672, has determined that the present franchise system of distribution should continue unaffected by the laws of Oklahoma or of any other state that subsequently may decide to adopt a similar non-franchise policy.

of *GTE Sylvania* applies equally whether the manufacturer's control over non-price, intrabrand competition is achieved through private contract or by some other means. It would be plainly inconsistent to hold that the Sherman Act permits vertical agreements under the rule of reason, but at the same time condemns as per se unlawful a statute whose sole purpose and effect is to make such agreements possible.

Even apart from the holding of *GTE Sylvania*, § 23672 does not require violation of the Sherman Act. The statute allows a distiller to designate any number of wholesalers as authorized importers of its products into California. A distiller may restrict importation to a single wholesaler, a few wholesalers, or it may designate all wholesalers in the state. The statute thus *permits*, but does not *require*, vertical restrictions on distribution.

The Sherman Act does not preempt state laws that only permit conduct that is judged under the rule of reason. In *New Motor Vehicle Bd. of Cal.* v. *Orrin W. Fox Co.* (1978) 439 U.S. 96, 110, n. 15, this Court upheld the California Automobile Franchise Act in the face of arguments that dealers might use it to press sham protests for the sole purpose of delaying establishment of competing dealerships. Such conduct, though made possible by the Automobile Franchise Act, would be vulnerable to suits under the federal antitrust laws and did not require invalidation of the state law (see also, *Seagram & Sons* v. *Hostetter* (1966) 384 U.S. 35, 45-46; *Exxon Corp.* v. *Governor of Maryland* (1978) 437 U.S. 117, 130-131).

Finally, even if § 23672 did in some cases lead to anti-competitive results, federal preemption would still be inappropriate so long as the state law does not attempt to authorize a per se violation of the antitrust law. To hold § 23672 preempted by the Sherman Act would invite challenges to any state regulatory scheme that injures a plaintiff's competitive position and thus might be claimed to reduce competition generally. But, as this Court has stated, "if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed" (*Exxon Corp.* v. *Governor of Maryland* (1978) 437 U.S. 117, 133).

CONCLUSION

For the foregoing reasons, we respectfully submit that this Court should reverse the decision of the court below.

Respectfully submitted,
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